COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
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Mr. Chairman, thank you for calling this important hearing on patent reform. I am looking forward to hearing a full examination of the implications of H.R. 1260, the Patent Reform Act of 2009.

Patents are linked irrevocably to innovation and invention. No less than the very soul of our economy rests on protecting, supporting and rewarding that innovation and invention. Article 1, Section 8 of the Constitution empowers Congress to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” That is a powerful charge, and one that I take very seriously.

Our patent system has supported folks like Samuel Morse, Thomas Edison, Alexander Graham Bell and the Wright brothers – Americans who changed the course of history and commerce. But despite this impressive track record, I’ve heard the argument that the United States should harmonize its patent system with Asia and Europe. I can only pronounce that to be the merest sliver of an excuse for “reform.”

It is no secret that I opposed the 2007 patent legislation, H.R. 1908. While I respected the intent and hard work of this Committee, there were too many patent stakeholders who testified they would be injured by the legislation to ignore. Even more troubling, there were patent experts from China and India enthusiastically saying that such a law would help companies in those countries more than companies here.

The legislation your committee is considering today, Mr. Chairman, has stark consequences for companies that rely on innovation for a competitive edge. At a time when America’s innovators, manufacturers and laborers need strong patent protection to compete internationally, the net effect of the bill will be to weaken patent protection by making patents less reliable, easier to challenge and cheaper to infringe.

While the Senate’s reported bill is an improvement from previous incarnations of so-called “patent reform,” specifically with regard to the damages provision, many issues remain to be addressed.

The Senate compromise drops the “apportionment of damages” language, which was the most contentious part of the bill. In its place, they included a gatekeeper function that requires better jury instructions that clarify the relevant factors of consideration in each case. I think this makes not only makes plain good sense, it is a much-needed improvement to the current patent litigation process. When we considered the patent bill on the House floor in 2007, there was an acknowledgement that the damages provisions as drafted at that time were not a final product but "would be fixed" as the bill moved through the process with the Senate. I am happy to see that the fix has indeed happened in the form of the gatekeeper function, and I urge this Committee to adopt this approach.

The post grant review provisions of the current legislation, however, threaten to diminish the value and enforceability of U.S. patent rights at a time when our country's economic recovery is depending on the strength of U.S. innovation. The current bill would create multiple avenues for challenging a patent's validity without any meaningful protections to prevent the abusive and serial attacks that plague the European system. Small innovators will find it particularly challenging to defend their rights against larger and better-financed challengers. One businessman recently told me that he doesn't even bother to file patents in Europe anymore because the process takes too long and often ends in a never-ending cycle of nonsensical challenges. If we're looking for harmonization, I would say we're aiming for the lowest common denominator. That's simply unacceptable.

It is clearly appropriate to have an administrative process for challenging patent validity, but it should exist within a structure that guarantees a quick – and final – determination. Congress must ensure the administrative processes provided for in the bill do not become a vehicle for infringers to avoid justice. I would encourage the Committee to include 1) an appropriate threshold for initiating administrative proceedings, 2) a presumption of validity in those proceedings so the challenger has the burden of establishing invalidity rather than requiring a patent holder to re-establish the validity already verified in the application process, 3) strong estoppel provisions to avoid serial challenges of the same patent by the same infringer or a group of infringers, and 4) a clear timeline for concluding administrative challenges.

The U.S. Supreme Court has issued more patent decisions in the last several years than in any time in history. It has re-written existing law by virtually eliminating permanent injunctive relief as a remedy to patent holders and has greatly expanded the ability to challenge a patent. The U.S. Patent and Trademark Office (PTO) is actively improving patent quality and creating new guidelines for patent examination and issuance. If Congress wants to improve the quality of U.S. patents, we should do so by making specific improvements to the process at the PTO which that agency would welcome. The legislation being considered by the Judiciary Committee does not do that. Instead it attempts to reform our litigation laws and picks industry winners and losers in the process. It is unnecessary, ill-conceived and ill-advised.

Mr. Chairman, you said at the committee markup of this legislation's predecessor – H.R. 1908 – that "Our patent system affects our whole economy, large and small. The slightest change to a single provision of law, alteration of a phrase, sometimes punctuation, can have unintended consequences and therefore can result in a devastating effect on a company or a business or an industry."

I couldn’t agree more with your statement, Mr. Chairman. And it is precisely because of the profound importance of the patent system that it is essential to take into account the views of the many industries and parties that will be affected by this dramatic change in the law. Unfortunately, many stakeholders, including universities, manufacturers, information technology, biotechnology, nanotechnology, and agriculture continue to sound alarms concerning the bill as introduced and as amended by the Senate Judiciary Committee.

Let us work together to strengthen American industries rather than put jobs at risk. Let's tackle consensus issues like Patent and Trademark Office efficiency, patent pendency and patent quality. Let’s work together to reform the system, rather than take actions – like diminishing the value of damages or undermining the reliability of a patent’s validity.

Thank you, Mr. Chairman, for the opportunity to share my thoughts on this important topic.

Rep. Donald A. Manzullo is the co-founder and co-chairman of the House Manufacturing Caucus. He has been awarded the Aerospace Industry Association’s Wings of Liberty, the National Association of Manufacturers Award for Manufacturing Legislative Excellence, and the National Federation of Independent Business Guardian of Small Business Award. He has received several endorsements from the U.S. Chamber of Commerce. He was also named Legislator of the Year by the International Franchise Association in 2005, "Best Friend in D.C." for small business owners by Inc. Magazine, and a Champion of Small Business Development by the Association of Small Business Development Centers. In 2004, The Manufacturer magazine called him “Mr. Fix-It.”